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No. 79-1164

In the Supreme Court of the United States

OCTOBER TERM, 1979

PETER LICAVOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xv) is reported at 604 F. 2d 613.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1979. A petition for rehearing was denied on November 28, 1979, and the petition for a writ of certiorari was filed on December 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to hold a separate evidentiary hearing on the reasonableness of a surreptitious entry into petitioner's office to install court-authorized electronic surveillance devices.

2. Whether the trial court erred in failing to hold a hearing on the adequacy of minimization of the electronic surveillance in this case.

3. Whether the trial court erred in failing to hold an evidentiary hearing to determine whether there were significant misrepresentations in an affidavit supporting the government's motion for an electronic surveillance order.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of receiving stolen property moving in interstate commerce having a value in excess of $5,000, in violation of 18 U.S.C. 2315. He was sentenced to 18 months' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. i-xv).

The evidence showed that in April 1976 petitioner attempted to sell a stolen painting, the *Lucretia*, to an undercover FBI agent (Pet. App. ii). After the agent made a $500 down payment, a search warrant was issued and federal agents seized the *Lucretia* from petitioner's art gallery (*ibid.*).

Included in the prosecution's evidence were several conversations recorded by means of electronic listening devices installed by FBI agents in petitioner's office and on his office telephone (Pet. App. i-ii). The court order authorizing this electronic surveillance was based on a finding of probable cause to believe that petitioner was dealing in stolen diamonds (*ibid.*).

ARGUMENT

1. Relying on this Court's statement in *Dalia* v. *United States*, 441 U.S. 238, 258 (1979), that the manner in which a warrant is executed is subject to later judicial review, petitioner contends (Pet. 4-7) that the district court erred in failing to hold an evidentiary hearing on the reasonableness of the surreptitious entry into his office to install the electronic surveillance device. In the circumstances of this case, petitioner's claim is unpersuasive.

Although the trial court did not grant a separate pretrial or post-trial hearing, petitioner had ample opportunity to inquire into the matter. Agent George, the FBI special agent in charge of the investigation, was a witness at the trial and was also examined outside the presence of the jury before the tape recordings made during the surveillance were played. At this time, petitioner had the opportunity to develop any facts concerning the placement and removal of the electronic device and the reasonableness of the intrusion. Petitioner failed to use this opportunity, and, as the court below observed, he "points to no circumstances indicating that the execution of the electronic surveillance was unreasonable" (Pet. App. vi).[1] Nothing in this Court's

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[1]There is no substance to petitioner's assertion (Pet. 5) that he could not cross-examine Agent George concerning the installation and removal of the device, because that inquiry would have exceeded the scope of the direct examination. George had testified on direct that a microphone was placed "in the bottom floor office of the Vesuvio Art Gallery located on the Grace Ranch, Tucson, Arizona" (Tr. 230). Indeed, petitioner brought out on cross-examination the dates on which the microphone was installed and removed (Tr. 238). An objection was sustained to petitioner's inquiry about which FBI agent installed the microphone (Tr. 239), but not to the inquiry about where, physically, it was installed (*ibid.*). Petitioner refers (Pet. 5) to the trial court's ruling limiting the scope of cross-examination to the

statement in *Dalia* suggests that the post-surveillance judicial review available to petitioner was inadequate. *Dalia* does not require district courts to grant a hearing in every case involving surreptitious entry, in the absence of any showing at all that unreasonably intrusive techniques were employed.[2] No court of appeals has found such a requirement in *Dalia*, and there is accordingly no issue here requiring this Court's review at this time.

2. Petitioner also asserts (Pet. 7-10) that the district court erred in failing to conduct an evidentiary hearing on the issue of the government's compliance with the minimization requirements of 18 U.S.C. 2518(5).[3] But while petitioner moved prior to trial to suppress the fruits of the electronic surveillance because of an alleged failure to minimize the interception, he did not request an evidentiary hearing on the question or identify any

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scope of direct examination (Tr. 246-248). That ruling was required because of petitioner's efforts to inquire about other items seized when the search warrant was executed, the diamond transactions, the time when the investigation of petitioner started, and the investigations relating to the theft of the picture (Tr. 244-251). The surreptitious entry question was not considered during the conference outside the presence of the jury.

[2]In *Dalia* the defendant received an evidentiary hearing after trial, so the question of what circumstances mandate such a hearing was not before the Court.

[3]This statute provides that "[e]very order and extension thereof shall contain a provision that the authorization to intercept * * * shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." The instant orders contained such provisions, and the agents followed the standard minimization procedure (Tr. 237-239).

improperly overheard conversations.[4] A hearing is not required if the grounds for suppression consist solely of conclusory allegations of illegality. See *United States* v. *Losing*, 539 F. 2d 1174, 1178 (8th Cir. 1976).[5]

Agent George testified (Tr. 237, 238-239):

> We initiated the wiretap at a certain time in the morning. We closed it out at a certain time in the evening. As we proceeded with the surveillance each day, we narrowed it down smaller and smaller. And when we ended, we only listened to the conversations

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[4]Petitioner contends (Pet. 7-9) that he was unable to identify improperly overheard conversations because he did not have access to the information necessary to determine what conversations were overheard. But he was informed of the time during which the order was in effect (Tr. 157, 237), and if he thought that any particular kinds of conversations conducted during that time should not have been overheard, he could have identified them.

[5]Contrary to petitioner's suggestion (Pet. 8), the holding in this case is not in conflict with *United States* v. *Losing, supra*. The defendant in *Losing* requested a pretrial hearing on the minimization question. 539 F. 2d at 1177-1178. Moreover, the record before the appellate court in *Losing* did not indicate how closely the district court supervised the interception (*id.* at 1180). The courts of appeals have agreed with the court below that supervision through periodic interim reports, such as those made to the issuing judge in this case, is a significant factor in determining whether the minimization requirement has been met. See, *e.g.*, *United States* v. *Armocida*, 515 F. 2d 29, 44-45 (3d Cir. 1975); *United States* v. *Quintana*, 508 F. 2d 867 (7th Cir. 1975); *United States* v. *Bynum*, 485 F. 2d 490, 501 (2d Cir. 1973).

Petitioner also suggests a conflict between the instant case and the decisions in *United States* v. *Armocida, supra; United States* v. *Quintana, supra;* and *United States* v. *Rizzo*, 491 F. 2d 215 (2d Cir. 1974). None of those decisions dealt with the question presented here—the necessity for a minimization hearing. Rather, in each of the cases the court of appeals considered the merits of a minimization claim and found that the minimization requirement had been met.

> which were pertinent to our case. Whenever there was a personal conversation that we felt was not pertinent, we turned the recorder off.
>
> * * * * *
>
> [W]e applied through the Court to obtain permission to [install a microphone]. * * * We had to maintain certain hours, which we, as I said, before, cut down to minimize and only listened to pertinent conversations.

The record is thus adequate to support the conclusion that the statutory minimization requirements were not violated.

3. Petitioner's final contention is that the trial court erred in failing to hold an evidentiary hearing on alleged misrepresentations in the warrant affidavit involving disclosure of various confidential informants (Pet. 12-16). The court of appeals correctly rejected this claim (Pet. App. viii-ix).

Prior to trial, petitioner moved to suppress the intercepted conversations on the ground that an affidavit filed in support of the application for the electronic surveillance order falsely represented that he was dealing in stolen diamonds (Pet. App. viii). The challenged affidavit was prepared by an FBI agent from information given to the FBI by two confidential informants whose identities have remained undisclosed for their protection (*ibid.*). Petitioner's allegations of misrepresentation were based on information he obtained from two persons he believes to be the informants (*ibid.*).

This Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), established that a defendant is entitled to a hearing only upon a substantial preliminary showing that statements in the affidavits concerning facts material to the finding of probable cause are deliberately false or made with reckless disregard for the truth. In this case the trial court conducted an in camera hearing to determine whether petitioner's evidence amounted to such a substantial preliminary showing of misrepresentation. After interviewing one of the confidential informants at the in camera hearing and examining the affidavit of the other, the district court concluded that petitioner had not met his burden under *Franks*.[6] The court of appeals reviewed the record of the in camera proceeding and agreed with that conclusion. This essentially factual question, resolved against petitioner by the two courts below, does not warrant further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

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[6]Making this inquiry of the informants in an in camera proceeding was proper. *Franks* does not require that an informant's identity be disclosed whenever a defendant makes a substantial preliminary showing of falsity in an affidavit in support of a search warrant. Rather, the Court explicitly reserved the question whether such disclosure would be required under any circumstances. 438 U.S. at 170. Even when the issue is guilt or innocence at trial—not the existence of probable cause—the court may properly conduct an in camera examination to evaluate the issue prior to ordering disclosure of an informant's identity. See *United States* v. *Anderson*, 509 F. 2d 724, 727, 730 (9th Cir. 1974), cert. denied, 420 U.S. 910 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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